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JUN 24 1998

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Southwestern Bell Telephone Company, )  
Pacific Bell, and Nevada Bell Petition for )  
Relief from Regulation Pursuant to Section 706 )  
of the Telecommunications Act of 1996 and )  
47 U.S.C. § 160 for ADSL )  
Infrastructure and Service )

CC Docket 98-91

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

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**OPPOSITION OF ALLEGIANCE TELECOM, INC.**

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Allegiance Telecom, Inc. ("Allegiance"), pursuant to the Federal Communications Commission's ("Commission") Public Notice, DA 98-1111 (rel. June 11, 1998), hereby submits the following comments in opposition to the Petition of Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell (collectively "SBC") for relief in the above-captioned proceeding.

Allegiance, through its subsidiaries, is authorized to provide local exchange and interexchange services in California, and facilities-based and resold local exchange services in Texas. Allegiance intends to provide ADSL and other telecommunications services to consumers in California and Texas both by reselling SBC's services and using unbundled loop facilities.

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## **INTRODUCTION AND SUMMARY**

High speed data transmission services such as ADSL are growing at an exponential rate and have even been touted as the technology of the future for data and voice. Allowing SBC to provide ADSL services over the copper loops in its control -- without any obligation to unbundle or resell these services to new entrants as required by law -- will likely eliminate any possibility of true competition for data services. After all, SBC controls the essential facilities that competitors need in order to access customers at their premises. The Texas Public Utility Commission (the state of SBC's largest local market), in rejecting SBC's § 271 application, has already recognized that the provision of unbundled xDSL facilities is required by the 1996 Act. The Commission should use § 706 to make a declaratory ruling, reaffirming that BOCs are required to provide unbundled and resold xDSL services pursuant to § 251 of the Act.

The continued resistance of SBC to implement its procompetitive obligations under the Act argues strongly against any waiver of its § 251 obligations. The fact that no BOC has yet passed the § 271 test is just one type of evidence of the monopoly control BOCs still maintain over bottleneck facilities. To date, the FCC has denied each § 271 application submitted by a BOC, including SBC's Oklahoma application, for failure to meet the requirements of the Act. Even if the BOCs were to eventually achieve § 271 authority, they should not be entitled to the relief they seek since such authority is premised on full compliance with the Act's unbundling and resale requirements.

SBC's current position that there is adequate competition in the provision of ADSL services is totally contradictory to the position it maintained before this Commission *less than six weeks ago* in a pending 706 proceeding, when it declared that the deployment of advanced telecommunications capabilities is not taking place either reasonably or timely. By naming some CLECs who hope to

deploy ADSL on a widespread basis, SBC suggests that the markets for such services are competitive. SBC does not even note that the negligible amount of ADSL testing currently in the market, as it is, is wholly dependent on access to its networks. In any case, SBC's conflicting statements suggest ulterior anticompetitive motives by SBC to evade its obligations to provide reasonable and nondiscriminatory competitor access to the facilities it controls. SBC will apparently say whatever is convenient to convince this Commission that it is entitled to offer the next generation of high speed services -- to the exclusion of others. This is inconsistent with a genuine intention to promote the deployment of advanced telecommunications capabilities to all Americans.

The statutory provisions of which SBC complains were adopted to limit the ability of BOCs to abuse their control of bottleneck facilities. Continued BOC monopoly control over local loops, the last mile of facilities necessary to reach nearly all customers, means one thing only: that competitors will not be able to provide customers with a choice of high-speed data service offerings. Granting waivers of SBC's fundamental obligations under § 251 is not in the public interest and would significantly undermine key aspects of the Act. The FCC should deny the Petition.

## **ARGUMENT**

### **I. The Public Interest Goals of § 706 Will Be Retarded -- Not Advanced -- If the Requested Relief Is Granted.**

#### **A. The Continued Resistance of SBC to Implement Its Procompetitive Duties Under the Act Argues Strongly Against Any Waiver Of Such Duties.**

The 1996 Act fundamentally changed telecommunications regulation by establishing a new regulatory regime to open up local exchange markets to competition. Section 251 of the Act imposes affirmative obligations upon ILECs, such as Petitioners, to interconnect, provide unbundled access and to provide resale to new entrants. SBC, however, has resisted compliance with the pro-competitive goals of § 251 on every front. Now, under the guise of promoting advanced telecommunications services, SBC is attempting to divest itself of its § 251 obligations in order to extend its monopoly regime to the provision of data services.

The fact that SBC has failed to pass the § 271 test is evidence of its continued monopoly control over bottleneck facilities. The Texas Public Utility Commission has rejected SBC's most recent § 271 bid, noting that new entrants presented evidence indicating "their difficulty in working with Southwestern Bell to interconnect, purchase unbundled network elements (UNEs) and provide resale."<sup>1</sup> In particular, Texas noted that SBC's efforts to facilitate ADSL services were lacking.<sup>2</sup>

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<sup>1</sup> *Investigation of Southwestern Bell Telephone Company's Entry Into the Texas InterLATA Telecommunications Market*, Commission Recommendation, Project No. 16251 (Tx. PUC June 3, 1998).

<sup>2</sup> *Id.* The Texas Public Utility Commission issued a "roadmap" regarding action that SBC must take before it can satisfy the requirements of § 271 of the 1996 Act. The roadmap states that SBC must publish a manual showing competitive local exchange carriers how to use unbundled loops to provide ADSL and HDSL services, and allow 4-wire HDSL service on unbundled loops.

In any case, compliance with § 271 assumes that SBC will fulfill the very obligations it here seeks to escape.

Allowing SBC to provide ADSL services over its bottleneck network without any obligation to unbundle or resell these services to new entrants will likely eliminate any possibility of true competition for such services. Data networks are growing at a tremendous rate and are (and will increasingly be) used for all communications purposes including telephony. Even as competitors are expending the resources to develop ADSL technology, grant of the Petition would allow SBC to cement its dominant position in the provision of data services while holding competitors back from realizing the opportunities that data services offer. Importantly, SBC could do so without any effort to develop or deploy ADSL services on its own. SBC could simply exploit the stranglehold that it would have this Commission grant by doing nothing, still stifling competitors' ability to offer consumers a choice.

SBC simply cannot be trusted to provide unbundled loops capable of supporting advanced data services to its competitors on a non-discriminatory basis. Competitors of SBC have already demonstrated their substantial difficulties in obtaining interconnection, unbundled network elements and resale from SBC. These problems are likely to get worse if the Commission grants SBC the discretion to "test" lines to determine the appropriateness of allowing competitors access to copper loops. In particular, SBC's determination of whether a line is fit for more than one service offering ( *see* Petition, pp. 17-20), is rife with the ability to cry interference and force customers to take voice and data services from SBC.

Finally, SBC claims that a waiver of the resale and unbundling obligations of § 251 will fulfill the public interest goal of § 706 by encouraging new entrants to build their own networks.

However, grant of the requested relief will only strip new entrants of the core mechanisms created by the Act to promote competition. Congress expressly granted new entrants with three paths of entry into the local exchange market: unbundled access, resale and the construction of their own facilities. Congress understood that new entrants could not practically duplicate the ubiquitous network controlled by BOCs.<sup>3</sup>

SBC seems to believe that the world has somehow forgotten that its bottleneck facilities were constructed under a regime of regulatory protection and at the expense of ratepayers. Under that regime, the BOCs have obtained huge amounts of capital and financial strength. SBC should not have the luxury of eliminating its unbundling and resale obligations for ADSL services simply for the sake of protecting its monopoly position obtained at the expense of the public.

**B. Inconsistencies of SBC's Statements Suggest Ulterior Anticompetitive Motives, Not A Genuine Intention to Advance the Goals of § 706.**

SBC's current position that there is adequate competition in the provision of ADSL services is totally contradictory to the position it maintained before this Commission *less than six weeks ago* in a pending 706 proceeding.<sup>4</sup> Then, it argued that there has been no widespread deployment of advanced telecommunications capability since the passage of the 1996 Act.<sup>5</sup> Despite the bleak picture it previously attempted to paint vis-a-vis competition, SBC now argues:

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<sup>3</sup> SBC's suggestions that cable modems and satellites are current and viable substitutes for high-speed access to the Internet, as opposed to copper lines that are already deployed, is ludicrous and, in any case, is propounded without basis. There is no showing that consumers could or would switch in response to a price increase.

<sup>4</sup> See *Consolidated Reply Comments of SBC Communications Inc.* in CC Docket Nos. 98-11, 98-26, and 98-32, filed on May 6, 1998, at p.7.

<sup>5</sup> *Id.*

[t]he SBC LECs' introduction of ADSL service is not at all like the paradigm in which the FCC has historically regulated -- the introduction of an incumbent of a service that has little to no initial competition. Instead of being the first to the market, the SBC LECs will often be the "second provider"-- if not the third or fourth -- with zero market share competing against pre-existing high-speed data services offered by entities that have no comparable regulatory oversight and thus much greater flexibility.

Petition at 10-11. Being "second" in the market has absolutely no bearing under the circumstances.

ADSL providers will attest in their own comments to the very modest extent of their current ADSL testing. More importantly, as such competitors provide service at the pleasure of SBC (SBC is in control of the copper loops and the required collocation space), it could easily exclude competitive offerings and vault itself to a dominant position. After all, unlike competitors, SBC will not have the onerous task of negotiating over access to loops and central and end office space. Thus, by inaccurately describing the market, it appears that SBC is interested only in immunizing its high-speed data service offerings from regulation and competitor access, and will say whatever is convenient in order to convince this Commission to grant the requested relief.

**C. Relief for ADSL Services From Dominant Treatment Would Contravene the Public Interest Goals of § 706 and § 10.**

Relieving SBC of dominant carrier treatment for the provision of ADSL services is not in the public interest. SBC suggests that it has no market power in the provision of ADSL services. In reality, it has total control of the network that it and competitors must utilize to provide high-speed data services. The Commission should not allow SBC, as a dominant carrier, to use pricing and accounting methods for nonregulated service offerings to subsidize ADSL infrastructure and investment, and to block its competitors' use of its loops, which would certainly be the ultimate

result. The critical nature of high-speed data services requires the most stringent separations requirements.

Although SBC does not concede that it has market power in the provision of ADSL services, this Commission has already determined that control of bottleneck facilities is prima facie evidence of market power.<sup>6</sup> In the Comsat Order, the Commission stated:

An important structural characteristic of the market place that confers market power upon a firm is the control of bottleneck facilities. A firm controlling bottleneck facilities has the ability to impede the access of its competitors to those facilities. We must be in a position to contend with this type of potential abuse. We treat control of bottleneck facilities as prima facie evidence of market power requiring detailed regulatory scrutiny.

Id. at ¶ 58. SBC has failed to rebut this evidence.

The Act's forbearance provisions were not intended to perpetuate the advantages enjoyed by the BOCs as monopoly providers. They certainly were not intended to allow them to leverage that monopoly into additional markets. Allowing SBC the freedom to price ADSL services without any

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<sup>6</sup> *Comsat Corporation; Petition Pursuant to Section 10(c) of the Communications Act of 1934, as amended, for Forbearance from Dominant Carrier Regulation and for Reclassification as a Non-Dominant Carrier; Policies and Rules for Alternative Incentive Based Regulation of Comsat Corporation; Comsat Corporation; Petition for Partial Relief From the Current Regulatory Treatment of Comsat World Systems' Video and Audio Services; Comsat Corporation; Petition for Partial Relief From the Current Regulatory Treatment of Comsat World Systems' Switched Voice, Private-Line, and Video and Audio Services; PANAMSAT Corporation; Petition to Reopen Changes in the Corporate Structure and Operations of the Communications Satellite Corporation*; File No. 60-SAT-ISP-97; IB Docket No. 98-60; File No. 14-SAT-ISP-97; RM-7913; CC Docket No. 80-634, Order and Notice of Proposed Rulemaking, FCC 98-78, ¶ 66 (April 28, 1998) (footnotes omitted) ("Comsat Order").



regulatory oversight, while maintaining monopoly control over bottleneck facilities, will only give SBC the ability to use its market power to monopolize the provision ADSL services in contravention of the purpose and spirit of the Act.

**D. SBC's Attempt To Deprive Future Entrants of Their MFN Rights Is Certainly Not In the Public Interest.**

The Eighth Circuit has clearly ruled that pursuant to § 252(i), competitive local exchange carriers may opt-in entirely to existing interconnection agreements. SBC has patently failed to justify its request for forbearance from this provision. Forbearance would simply permit SBC to escape from performing its contractual obligations without any benefit to the public. SBC's attempt to deprive future entrants of their right to fair network access is untenable and certainly does not promote competition.

**II. NEITHER § 706 NOR § 10 OF THE ACT AUTHORIZE THE FCC TO GRANT THE REQUESTED RELIEF.**

By its plain terms, § 706 of the 1996 Act only authorizes the FCC to use existing regulatory tools, such as its forbearance authority or price cap regulation to achieve that section's goal. As already fully briefed before this Commission, § 706 of the 1996 Act does not grant regulatory forbearance authority independent of that granted in § 10. SBC's separate reliance on § 10, in any case, should prove to be fatal. Since § 10 prohibits the FCC from modifying SBC's § 251(c) duties before they are fully implemented, the requested relief may not be granted.

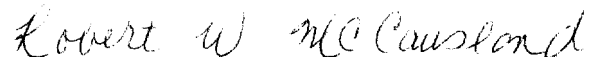
Even if the FCC were to determine that it had authority to grant some or all of the requested relief, it should not do so because such a waiver would not be in the public interest. The public interest demands that consumers have a choice of competitive offerings -- not continued relegation to a monopoly provider. SBC has yet to show that it will grant the access that it is required to

provide to competitors under the Act. The fact that no BOC has passed the § 271 test is simply one type of evidence of the monopoly control BOCs still maintain over bottleneck local exchange facilities. SBC cannot be trusted to provide unbundled loops capable of supporting advanced services to competitors on a nondiscriminatory basis when it is not *currently* complying with its § 251 obligations. The public cannot benefit from this continued defiance.

### **CONCLUSION**

For the foregoing reasons, the Petition of Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell must be denied. Abdicating the Petitioners' obligation to comply with the core principles of the 1996 Act is not consistent with the public interest goals of § 706, and will only serve to further consolidate the breadth of facilities subject to their monopoly control. Grant of the instant Petition will only reward BOCs for their continued strategy of recalcitrance and anticompetitive control of bottleneck facilities.

Respectfully submitted,



Robert W. McCausland  
Vice President, Regulatory and Interconnection  
Allegiance Telecom, Inc.  
1950 Stemmons Freeway, Suite 3026  
Dallas, TX 75207-3118  
(214) 853-7100 (Tel)  
(214) 853-7110 (Fax)

Date: June 24, 1998

## CERTIFICATE OF SERVICE

I hereby certify that on this 24<sup>th</sup> day of June 1998, copies of the foregoing Opposition of Allegiance Telecom, Inc. in CC Docket No. 98-91 were served by overnight delivery and hand delivery as indicated below:

Chairman William Kennard\*  
Federal Communications Commission  
1919 M Street N.W.  
Washington DC 20554

Commissioner Susan Ness\*  
Federal Communications Commission  
1919 M Street N.W.  
Washington DC 20554

Commissioner Harold Furchtgott-Roth\*  
Federal Communications Commission  
1919 M Street N.W.  
Washington DC 20554

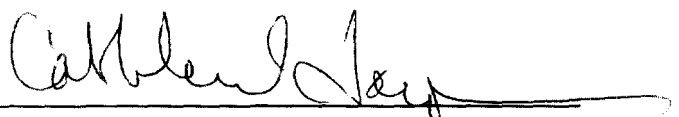
Commissioner Michael Powell\*  
Federal Communications Commission  
1919 M Street N.W.  
Washington DC 20554

Commissioner Gloria Tristani\*  
Federal Communications Commission  
1919 M Street N.W.  
Washington DC 20554

Janice M. Myles\*  
Common Carrier Bureau  
Federal Communications Commission  
1919 M Street, NW, Room 544  
Washington, DC 20554

ITS, Inc.\*  
1231 20<sup>th</sup> Street, NW  
Washington, DC 20036

Robert M. Lynch\*\*  
Durward D. Dupre  
Darryl W. Howard  
Southwestern Bell Telephone Company  
Pacific Bell  
Nevada Bell  
One Bell Plaza, Room 3703  
Dallas, TX 75202

  
Cathleen D. Sampson

\* Hand Delivery

\*\* Overnight Delivery